IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 75.

THE UNITED STATES, *Petitioner*,

v.

ALGERNON BLAIR, Individually, and to the use of Roanoke Marble and Granite Company, Inc.

BRIEF AS AMICUS CURIAE IN BEHALF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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PRELIMINARY STATEMENT.

The Associated General Contractors of America, Inc., with its principal office in Washington, D. C., is a national association of general contractors engaged in the building and construction industry.

The Government's construction work is to a substantial extent performed by members of this Association. The cost of such work in the future may be vitally affected by the decision of this Court in the present case. The rule has been firmly established that under the standard form of

construction contract a general contractor may recover his increased costs and expenses incident to an unreasonable Government delay, and this has enabled general contractors to bid closely.

Several members of this Association have cases pending before the Court of Claims of the United States which will be affected by the decision in this case. The financial consequences of unreasonable Government delays are so serious at times that financial ruin is visited upon general contractors.

This Association cooperated with the Interdepartmental Board of Contracts and Adjustments in that Board's work of standardization of contracts forms in use by the Government departments in respect of the standard form of construction contract which was prepared by that Board about August 20, 1926, and became U. S. Govt. Standard Form No. 23.[1] This form has been revised since that time in certain respects, but Article 9 has remained substantially unchanged.

At the time of the adoption of U. S. Govt. Standard Form No. 23, the rule was well established over a long period of years, and has been consistently adhered to, that if a general contractor is impeded during progress by an unreasonable Government delay, he may recover his increased costs and expenses brought about by such a delay, notwithstanding an extension of the contract time for such a delay, unless the contract contains a stipulation relieving the Government of responsibility or liability for damages for delay.

Prior to the time of the adoption of U. S. Govt. Standard Form No. 23, forms were in use by the Government departments which contained language relieving the Government of responsibility or liability for damages for Government delay. This Association suggested the elimination of such clauses, because they were not only unfair to general con-

[1] See Transcript of testimony, *Harwood Nebel Construction Company* v. *United States*, C. Cls. No. 44587, pp. R. 1 to R. 34, and Exhibits R 1 to R 9, regarding constitution and activities of Interdepartmental Board of Contracts and Adjustments.

tractors, but they harmed the public interest in that their appearance resulted in higher bid prices for Government work, and also resulted in restricted bidding, since many general contractors are unwilling to bid work where the Government disclaims liability for delay. There is no question but that the Government saves annually millions of dollars on the mere difference between the lowest and the next lowest bid, and it is in the public interest for the Government to frame its contracts in such a manner as to attract sufficient bidders.[2] The judgments which are rendered annually by the Court of Claims in construction contract cases are relatively insignificant in amount when compared with the savings effected annually by the Government under the competitive bid system which exists.

When U. S. Govt. Standard Form No. 23 was finally prepared, clauses relieving the Government of responsibility and liability for damages for delay were intentionally left out, thus definitely evincing an intent not to disclaim such liability in view of the firmly established rule that in the absence of such an exculpatory clause the Government was liable.[1] Clauses relieving the Government of responsibility

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[2] For example, for the Titusville-Cocoa Airport, Florida, six bids were received August 5, 1943, on Schedule I, preparation of site, ranging from the contract low of $405,626 to $498,711, with a difference of $51,999 between the lowest and next lowest bid; on Schedule II, paving, nine bids were received on the same date, two on the coquina rock alternate, and seven on the limerock base course alternate, ranging from the low of $554,578 to $901,380, with a difference of $7,562 between the lowest and next lowest bid. See Engineering News-Record, November 4, 1943, p. 118. For the El Paso Municipal Airport, Texas, eight bids were opened August 20, 1943, on Schedule I, preparation of site, ranging from the low of $71,780 to $134,721, with a difference of $14,670 between the lowest and next lowest bid; eight bids were received on Schedule II, paving, ranging from $733,800 to $1,526,450, with a difference of $73,068 between the lowest and next lowest bid, and thirteen bids were received on Schedule III, lighting, ranging from $27,396 to $65,592, with a difference of $4,222, between the lowest and next lowest bid. See Engineering News-Record, September 23, 1943. Federal Government construction in the United States for the first nine months of 1943 amounted to about $1,994,969,000. See Engineering News-Record, October 7, 1943, p. 1.

or liability for damages for delay have only been used occasionally since that time where the circumstances of the contract may have warranted their use.

In the case at bar, the contract does not contain any stipulation relieving the Government of responsibility or liability for damages for delay.

If a general contractor is to assume the risks of unreasonable Government delay, then such a contractor is entitled to a higher bid price for the work, because the contract is a speculative one, and it is impossible to forecast the amount of increased costs and expenses which may be brought about by such a delay. Such losses may range from about $10,000.00 to $300,000.00, dependent on the size of the contract, and the disruptive effect of the delay.

It is not the usual thing for an unreasonable Government delay to occur on a job, but it is a hazard which most general contractors are unwilling to assume.

No intelligent bid can be submitted unless a general contractor knows when he can start work, and the period within which he may do the work, because time is a vital and essential element in such contracts, as the cost of labor, material, fabricated articles, rental value of equipment, sub-contracts, supervisory personnel, job overhead and office overhead depend on the same.

It is far more economical for the Government to pay for the increased costs and expenses brought about by an unreasonable Government delay in a particular case where such a delay occurs rather than pay higher prices for its work generally, and this was a factor which influenced the Board to omit from the standard form of construction contract clauses which relieved the Government of responsibility or liability for damages for delay.[1]

QUESTION DISCUSSED.

Is the respondent here, the contractor handling the general construction, entitled to recover his increased costs and expenses resulting from the unreasonable delay in the per-

formance of the mechanical work, which was handled by the Government under a separate contract with another contractor? In the interest of brevity, this brief will be confined to this question.

FACTS.

On November 9, 1933, the Government issued invitations for bids, to be opened December 1, 1933, together with detailed specifications, drawings, and standard contract forms, calling for separate bids to be considered in connection with the making of contracts for (1) "General Construction"; (2) "Plumbing, Heating, and Electrical Work"; (3) "Electric Elevators"; (4) "Steel Water Tank and Tower"; and (5) "Refrigerating and Icemaking Plant." (Finding 1, Tr. 31) This was for the construction at Roanoke, Virginia, of fourteen buildings, with certain connecting and incidental structures, as a veterans hospital facility.

The invitation for bids provided in part as follows:

> "(5-A) Invitation for Bids.— • • •
>
> "Bids will be considered only from responsible individuals, firms, or corporations. In determining the lowest responsible bidder, consideration will be given as to whether the bidder involved maintains a permanent place of business; has adequate plant equipment to do the work properly and expeditiously; has a suitable financial status to meet obligations incident to the work and has appropriate technical experience. • • •
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> • • •
>
> "(1P-1) Standard Specification for General Conditions for Plumbing. • • •
>
> "Time and Manner of Performing the Work.—The plumbing work shall be performed in harmony with the other work on the buildings and shall be performed at such times as may be directed by the Superintendent of Construction, so as not to delay any other work on the buildings.
>
> • • •

"(A1H-1 General Conditions for Heating. * * *

"The work shall be performed in harmony with other work on the buildings and at such times as may be directed by the Superintendent of Construction.

* * *

"Time for Completion.—All work under this section of the specification shall be completed at a date not later than provided for in the contract for General Construction (See Construction Section of Specifications and Proposals Sheets) for the completion of work under that contract. * * *."

The invitation for bids and the specifications upon which respondent submitted his bid; and on which he was awarded a contract, were for "General Construction" of the buildings, roads, and other work called for therein. The invitation for bids stated that separate bids would be received and separate contracts made for the several classes of work mentioned. The General Provisions of the Specifications (section 1G, par. 7) and the Standard Forms of Contracts awarded, including the contract and specifications of respondent, provided (section 13) that "The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor." (Finding 1, Tr. 31.)

Under this and other provisions of the contracts the Government assumed the obligation and duty of taking such action at the proper time as would prevent any contractor with the Government from unreasonably delaying or interfering with the work and progress of any other of the Government contractors. The Government failed to fulfill and discharge this obligation and duty under its contract with respondent, and by reason of such failure respondent was unreasonably delayed and put to extra and unnecessary costs and damages. (Finding 1, Tr. 31.)

The specifications, on all of the five different classifications of work mentioned above and for which bids were asked, were in one document and were delivered to each of the bidders. (Finding 1, Tr. 31.)

In the invitation for bids, the printed bid form, and the specifications, the bidders were not permitted to state or propose the period of time within which the work called for by the specifications and drawings, upon the basis of which they were to submit their bids, was to be completed. Instead, the period of time for completion of the work was fixed and stated by the Government as 420 calendar days after the date of receipt of notice to proceed. The last paragraph of Item 1 of the printed bid form for General Construction which respondent used in making his bid provided as follows: "Performance will begin within ten (10) calendar days after date of receipt of notice to proceed and will be completed within four hundred and twenty (420) calendar days after date of receipt of notice to proceed, except that Administration and Storehouse buildings will be completed 30 and 60 days, respectively, prior thereto and Radial Brick Chimney and sufficient work in Boiler House Building to permit installation of boilers and equipment will be completed 90 days prior thereto." This identical provision was also written into Article 1 of the contract subsequently executed, as the last paragraph of that Article. (Finding 2, Tr. 31-32.)

Bidders for the plumbing, heating, and electrical work called for by the specifications were likewise not permitted to state or fix the time within which they would complete the work called for and for which bids were submitted, but the invitation for bids, the printed form of bid, and the specifications fixed the period for completion. The printed form on which the bidders for plumbing, heating, and electrical work submitted their bids provided as follows: "The above bid is made with the understanding that all work covered thereby will be completed at a date not later than that provided in the contract for 'General Construction' with the exception that plumbing, heating, and electrical

work in connection with Boiler House Building will be required to be completed 30 days in advance of other work and such work in connection with the Administration and Storehouse Buildings shall be completed 30 and 60 days, respectively, prior thereto." This provision was incorporated in the contract as subsequently made for the plumbing, heating, and electrical work. (Finding 2, Tr. 32.)

On December 2, 1933, the Government accepted respondent's bid for the general construction work, and the parties entered into a contract dated December 2, 1933. The total contract price as adjusted for agreed changes was $1,228,402. (Finding 3, Tr. 32-33.) The contracting officer mailed respondent notice to proceed on December 19, 1933, which was received on December 21, thereby fixing February 14, 1935, as the date for completion of all the work called for by the contract under the contract period as fixed by the Government. (Finding 4, Tr. 34.)

Under the invitation for bids and detailed specifications issued November 9, 1933, for all plumbing, heating, and electrical work required or necessary to be installed in the buildings to be constructed by respondent in an orderly manner as respondent's construction work proceeded, one C. J. Redmon, trading as Redmon Heating Co., submitted a bid of $300,000.00, which was accepted by the Government on December 6, 1933, and a contract on the standard form was entered into between the Government and the Redmon Heating Company. Under this contract Redmon was obligated and required to furnish all labor and materials and perform all work required for the complete installation in and at the buildings covered by respondent's contract and to be constructed by him, of all plumbing, heating, and electrical work, including all outside distribution systems for all buildings, but not including electric elevators, steel water tank and tower, refrigeration and ice plant. The contracts between respondent and the Government and between Redmon and the Government contained a provision that "The Government may award other contracts for additional work, and the contractor shall fully

cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor." Respondent at all times throughout the prosecution of the work called for by his contract fully complied with this provision, but C. J. Redmon did not at any time comply with this provision, and the Government delayed unreasonably in taking such action, after repeated protests by respondent, as would avoid unreasonable delay to respondent. (Finding 6, Tr. 35.)

Redmon, the mechanical contractor, did not at any time between the date he was given notice to proceed and June 26, 1934, when his contract was abandoned and terminated, have adequate equipment or men on the job properly to carry on the work called for and required by his contract, and Redmon was not financially able to carry on and complete the work under his contract at any time between the date of the contract and the date on which it was abandoned by Redmon and thereupon terminated by the Government. The failure of Redmon to commence and prosecute the work called for by his contract with the Government and which was necessary in order that respondent might properly proceed with his work, was due to financial difficulties and to willful neglect. Reasonable inquiry by the Government when respondent first began to protest in January, 1934, would have disclosed these facts, but no such inquiry was made by the Government. No inquiry or investigation was made by the Government as to Redmon's plant equipment or financial status before he was given the contract for the plumbing, heating, and electrical work necessary to be furnished and installed in connection and cooperation with respondent's work. (Finding 7, Tr. 36.)

In cases of this kind involving separate and independent contracts for construction and mechanical work, it is the usual and recognized practice for the contractor for the general construction orderly to progress with his work so

as to permit the proper installation therein of all necessary mechanical materials and equipment. This respondent at all times did. It is also the usual and recognized practice that the mechanical contractor must orderly and diligently so prosecute his work as to properly place and install all necessary mechanical equipment and materials as called for in the work of the general contractor so as not unreasonably to delay the progress of the work of the general contractor. This the Redmon Heating Co., as the mechanical contractor, at all times prior to the date on which its contract was terminated failed to do. (Finding 8, Tr. 36-37.)

In accordance with the usual practice in such cases respondent shortly after his contract was entered into prepared a progress schedule showing that he planned and intended to finish all the work called for by his contract by November 1, 1934, a period of 314 calendar days from the date of receipt of notice to proceed. This schedule was furnished to the Government and the Government's mechanical contractor on March 30, 1934. It was the desire of the Government and the intention of the parties to the contract that respondent's work be completed as soon as possible after notice to proceed had been given and the contracting officer so notified respondent in the early stage of the work and thereafter. There was no express or implied stipulation or agreement in the contract that the Government would not be responsible or liable to respondent in damages for excess costs and expenses occasioned by delay caused by the Government in the completion of the work in less time than the period of 420 days fixed by the Government for the purpose of charging respondent liquidated damages, at a specified rate of $175 per day in the event respondent failed without the excuses mentioned to deliver the completed work within the time so fixed. (Finding 9, Tr. 37)

Respondent's bid was based on the progress which he planned to make, and which he would have made except for the delays caused him by the failure of the mechanical contractor properly and orderly to prosecute his work, and the

failure of the Government to take proper action with reference thereto. (Finding 9, Tr. 38; Findings 10-14, Tr. 38-44)

Beginning June 29, 1934, the Maryland Casualty Company, surety on Redmon's bond, undertook to carry on some of the work called for by Redmon's contract, but made unsatisfactory progress with a force of about 12 men per day. On July 16, the Maryland Casualty Company made a contract with the Virginia Engineering Company to take over Redmon's unfinished work, and this contractor finished the work. (Finding 14, Tr. 41-44)

Respondent was thereby unreasonably delayed in the completion of the work called for by his contract for a period of 3½ months, as a result of which he incurred and paid increased costs amounting to $51,249.52 in excess of the costs included in the contract price and in excess of the costs which he would otherwise have incurred except for such delay. (Finding 14, Tr. 44)

OPINION BELOW.

The opinion of the Court of Claims is reported in 99 C. Cls. —. On October 5, 1942, the Court of Claims entered judgment in favor of the respondent in the sum of $130,911.08, (Tr. p. 92) on six items. Item 1 consists of damages representing increased costs resulting from delays in performance of mechanical work in the sum of $51,249.52. (Finding 13, tr. 40; Findings 14-20, Tr. pp. 40-74)

Judge Madden in a dissenting opinion stated that he was unable to agree with the disposition which the Court made of all items other than item 1. (Tr. 92) The decision of the Court below respecting item 1 was unanimous.

ARGUMENT.

I. There is No Conflict Between the Decision Below Allowing Recovery Because of the Unreasonable Government Delay and United States v. Rice, 317 U. S. 61, and Crook Co. v. United States, 270 U. S. 4.

In *Crook Co.* v. *United States*, 270 U. S. 4, which affirmed 59 C. Cls. 593, the plaintiff there had a separate contract with the Government to furnish and install heating systems "one in the Foundry Building, and one in the machine shop at the Navy Yard, Norfolk Virginia." It allowed 200 days from the date of delivering a copy to the plaintiff for the work to be completed. A copy was delivered on August 31, 1917, making March 19, 1918, the day for completion. But it was obvious on the face of the contract that this date was provisional, because the contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time. "The approximate contract date of completion for the foundry" was stated to be March 17, 1918, and that for the machine shop, February 15, 1918. The same dates were fixed for completing the heating systems, but the heating apparatus had to conform to the structure, so that if the general contractors were behind-hand the heating also would be delayed. They were behind nearly a year. These facts are set forth in the opinion of this Court. Mr. Justice Holmes, who delivered the opinion of the Court, stated in part as follows:

> "* * * When such a situation was displayed by the contract it was not to be expected that the government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.
>
> "The government did fix the time very strictly for the contractor. * * * Much care is taken therefore to keep him up to the mark. * * * *But the only reference to delays on the government side is in the agreement that if caused by its act they will be regarded as unavoidable*, which, though probably inserted primarily for the

contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the government to do. Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit. * * * Liability was excluded expressly for utilities that the government promised to supply. We are of opinion that the failure to exclude the present claim was due to the fact that the whole frame of the contract was understood to shut it out, although in some cases the government's lawyers have been more careful. Wood v. United States, 258 U. S. 120, 66 L. ed. 495, 42 Sup. Ct. Rep. 209. The plaintiff's time was extended and it was paid the full contract price. In our opinion it is entitled to nothing more." (Italics supplied)

An examination of the record in *Crook Co.* v. *United States, supra,* shows that the specifications there contained a stipulation reading in part as follows:

"14. Unavoidable delays.—* * * Delays caused by acts of the Government will be regarded as unavoidable delays. * * *"

That case like *United States* v. *Rice, supra,* involved a mechanical contractor who was to fit his work in and perform in harmony with the progress of the general contractor, and it was in effect held that by virture of the nature of the contract, the plaintiff assumed the risk of delay occurring in the general construction particularly where there was a special stipulation that if delays are caused by the Government they will be regarded as unavoidable. In the Editor's footnote to *Crook Co.* v. *United States,* 70 L. ed. 438, it is stated in part as follows:

"As a general statement, the great weight of authority supports the rule that in the absence of stipulations in the contract which preclude recovery, as in the reported case, a contractee is liable for delays resulting in damage to his contractor. * * *"

In *Wood* v. *United States,* 258 U. S. 120, which affirmed 55 C. Cls. 533, referred to in *Crook Co.* v. *United States, supra,*

the plaintiff there had a separate contract with the Government to furnish and install a boiler plant, heating system and other apparatus for the post office building at Washington, then under construction. The time for completion was 250 working days. The contract provided that for each day's delay "in the execution of the work" caused "through any fault" of the government, one additional day was to be allowed for its completion; but "that no claim shall be made or allowed for damages which may arise out of any delay caused by the" government. Suit was brought for expenses and losses resulting from a government suspension as well as for extra work. The Court of Claims entered judgment for the value of the extra work, but denied recovery of damages due to the suspension, following its decision in *Merchants Loan & T. Co.* v. *United States*, 40 C. Cls. 117. In *Wood* v. *United States*, *supra*, Mr. Justice Brandeis, who delivered the opinion of the Court, stated in part as follows:

> "The appeal to this court was taken before our decision in Wells Bros. Co. v. United States, 254 U. S. 83, 65 L. ed. 148, 41 Sup. Ct. Rep. 34. * * * But here, as there, the contract provided that no claim shall be made or allowed for any damages which may arise out of any delay caused by the United States. * * *"

In the case at bar, there was no suspension of the contract work, and there was no clause exempting the Government from liability for damages for delay.

In *Merchants Loan & T. Co.* v. *United States*, *supra*, the contract in controversy covered the interior finish of basement, first story, etc., of the post office, Washington, and the time when this work could be started and finished depended on the progress made with other work at the building. The work was to be completed within eight months from the date of the approval of the bond. The contract provided that "if, through any fault of the party of the first part the party of the second part is delayed in the execution of the work included in this contract, the party of the second part shall be allowed one day additional to the time above stated

for each and every day of such delay so caused, the same to be ascertained by the Supervising Architect; provided further, *that no claim shall be made or allowed for damages which may arise out of any delay caused by the party of the first part.*" Because of Government delay in letting contracts for other work, the plaintiff was delayed. Judge Wright, who delivered the opinion of the Court, stated in part as follows (40 C. Cls. 117, 132). (Italics supplied.)

> "The provisions of the contract just recited are as valid and binding as any other part of it, and having been voluntarily entered into the contractor has agreed that no claim shall be made or allowed arising out of the delay caused by the defendants mentioned in the findings. Extra time to the contractor was made the equivalent for delay caused by the defendants; and the claimant has not shown that such extra time was refused by the defendants."

There have been other cases before the Court of Claims where it was recognized that the exculpatory clauses in the contracts were fatal to recovery. In *Southern Surety Co.* v. *United States*, 75 C. Cls. 47, which involved a contract dated December 11, 1923, for the construction of a roadway in New York, Judge Littleton, who delivered the opinion of the Court, stated in part as follows (75 C. Cls. 47, 68-69):

> "The Contract in this case also provided that 'He [the contractor] will make no claim against the United States by reason of estimate, tests, or representations of any officer or agent of the United States'. This provision is as valid and binding as any other part of the contract and, having been voluntarily entered into, the plaintiff is precluded from maintaining suit to recover an account of errors in the estimates as to the quantities of material. *Merchants' Loan & Trust Co.* v. *United States*, 40 C. Cls. 117. In *Wells Brothers Co.* v. *United States*, 254 U. S. 83, the court stated in reference to a provision in the contract wherein plaintiff agreed not to make claim for delay caused by the United States, that 'Such language * * * cannot be treated as meaningless and futile and read out of the contract.

Given its plain meaning it is fatal to the appellant's claim'."

In *John N. Knauff Co., Inc.* v. *United States*, 78 C. Cls. 423, which involved a contract dated January 19, 1920, for remodeling a certain building, the specifications (p. 443) made a part of the contract provided that "no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

In *United States* v. *Rice*, 317 U. S. 61, reversing 95 C. Cls. 84, the plaintiff there had a separate contract with the Government to install plumbing, heating, and electrical equipment in a Veterans' Home at Togus, Maine, while another contractor was to do the general construction. Mr. Justice Black, who delivered the opinion of the Court, stated in part as follows:

"* * * We do not think the terms of the contract bound the government to have the contemplated structure ready for respondent at a fixed time. Provisions of the contract showed that the dates were tentative and subject to modification by the government. * * * Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work. Under these circumstances it seems appropriate to repeat what was said in the H. E. Crook Co. Case, that 'When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.' (H. E. Crook Co. v. United States, supra (270 U. S. 6, 70 L. ed. 443, 46 S. Ct. 184). Decisions of this Court prior to the H. E. Crook Co. Case also make it clear that contracts such as this do not bind the government to have the property ready for work by a contractor at a particular time. Wells Bros. Co. v. United States, 254 U. S. 83, 86, 65 L. ed. 148, 150, 41 S. Ct. 34; Chouteau v. United States, 95 U. S. 61, 24 L. ed. 371, supra; cf. United States v. Smith, 94 U. S. 214, 217, 24 L. ed. 115."

In other words, in contracts such as the above where the mechanical contractor is required to adjust his work to that of the general contractor, the mechanical contractor assumes the risk of delay in starting the work, and cannot recover. In every contract case, it is necessary to consider the nature of the contract, because the reasonable contemplation and intent of the contract depends on it. In the case at bar, however, the contract was for the general construction where the contractor was required by its terms to begin performance within 10 calendar days after date of receipt of notice to proceed, and complete the same within 420 calendar days, a contractual relationship wholly unlike that which existed in *United States* v. *Rice, supra.*

Judge Madden in his dissenting opinion in *Rice* v. *United States,* 95 C. Cls. 84, 107-108, stated in part as follows:

> "The defendant did not agree to have the building ready for the contractor who was to install the plumbing, heating and wiring at any fixed time, and from the specifications and contract, plaintiff must have known that its time of performance was dependent upon the progress of the building contractor. The specifications clearly directed its attention to the contract for general construction and advised it that its contract was to be performed in harmony with the other work on the building. Article 1 of the contract provided that the work under it was to be completed 'at a date not later than that provided for in the contract for General Construction,' but there was no promise on the part of the defendant as to when that date would be. Plaintiff must have known that the government reserved the power to make changes in the builder's contract, as well as in its own, and that exercise of that power would necessarily cause delay. *Cf. H. E. Crook Co.* v. *United States,* 270 U. S. 4; *Gertner, Sr.* v. *United States,* 76 C. Cls. 643."

That view was adopted by this Court in reversing the decision below.

In *Gertner, Sr.* v. *United States,* 76 C. Cls. 643, 660, cited above, Chief Justice Whaley in construing a contract for

furnishing and installing mechanical equipment in a power plant and laundry building stated in behalf of the Court in part as follows:

> "* * * The plaintiff knew by the very nature of his contract it was subservient to the main contract for the erection of the power house by the general contractor and his contract required him not to impede the work of completion of this building. *Crook* v. *United States*, 59 C. Cls. 593; 270 U. S. 4."

In *Wells Brothers Co.* v. *United States*, 254 U. S. 83, affirming the Court of Claims, mentioned in *United States* v. *Rice, supra*, the contract there contained a clause, "provided, further, *that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States.*" It was for the construction of a post office and court house building in New Orleans, dated September 30, 1909, for which the contractor was to be paid $817,000. Mr. Justice Clark, who delivered the opinion of the Court, stated in part as follows (254 U. S. 83, 87) (Italics supplied):

> "Here is a plain and unrestricted covenant on the part of the contractor, comprehensive as words can make it, that it will not make any claim against the government 'for *any damages* which may arise out of *any delay* caused by the United States' in the performance of the contract, and this is emphasized by being immediately coupled with a decision by the government that, if such a claim should be made, it would not be allowed.
>
> "Such language, disassociated as it is from provisions relating to 'omissions from,' the making of 'additions to or changes in,' the work to be done or 'material' to be used, cannot be treated as meaningless and futile, and read out of the contract. Given its plain meaning, it is fatal to the appellant's claim."

The decisions involving mechanical contractors who were to fit their work into the main contract, and perform in harmony with the progress made in the general construction, and decisions involving contracts which relieved the

Government of responsibility or liability for damages for delay have no application to the case at bar. The respondent here was the general contractor performing the general construction, and he did not sign a contract under which the Government disclaimed liability for delay. The general contractor in charge of the general construction has the responsibility of scheduling the progress to be maintained, and sets the pace for the subcontractors whose work must fit in with the general construction and be performed in harmony with the progress maintained by the general contractor. (Finding 9, R. 37.)

Why did the Government as a general proposition abandon the use of exculpatory clauses relieving it of responsibility or liability for damages for delay? Isn't it fair to assume that the Government found it to be in the public interest to do so? Why should the Government be compelled by reason of such clauses to pay higher prices for its work if no unreasonable delay is to ensue? Isn't it far more economical to pay for such increased costs brought about by an unreasonable Government delay if such a delay occurs in a particular case? Doesn't the use of such clauses result in restricted bidding and thereby the bid prices are higher than they would be if there were more bidders? Don't such clauses frighten prospective bidders away because they either do not care to bid such work with attendant unknown risks as to increased costs, or they cannot afford to gamble on such a speculative enterprise?

Isn't it also fair to assume that in view of the prior repeated use of exculpatory clauses, the Government would have in the instant contract used such a clause if it had intended to escape liability for damages for delay?

There have been several decisions of the Court of Claims permitting recovery of increased costs because of unreasonable Government delays subsequent to the decision of this Court in *United States* v. *Rice, supra*.

In *J. L. Young Engineering Co., Ltd.* v. *United States*, 98 C. Cls. 310, decided February 1, 1943, after the decision of this Court in *Rice* v. *United States, supra*, the general con-

tractor for the construction of certain buildings for the United States Immigration station at Honolulu, was delayed 90 days by the Government's failure to furnish drawings and models, and it was there held that the contractor was entitled to recover the expenses chargeable to the delay. Judge Madden, who delivered the opinion of the Court, stated in part as follows (98 C. Cls. 310, 324):

> "The defendant asserts that plaintiff could not have been delayed more than seventy days because it completed the job within seventy days after the date called for in the contract. But the evidence persuades us that, if plaintiff's work had not been delayed by the defendant's breach of contract, it would have completed it sometime before the agreed date. The contract contained no promise that plaintiff would not complete the work before the agreed date, and gave the defendant no right to unreasonably prevent earlier completion. Blair v. United States, No. 43548, decided October 5, 1942. (99 C. Cls. . . . .)"

In *Arnold M. Diamond* v. *United States*, 98 C. Cls. 543, decided March 1, 1943, it was held that the plaintiff was entitled to recover his extra costs incurred by reason of Government delay. In that case, the plaintiff had a contract for the installation of electric generating equipment consisting of a turbo-alternator and condenser at the Norfolk Navy Yard. The Government was to furnish the electric generating equipment. The work was to be commenced within 5 calendar days after date of receipt of notice to proceed and be completed within 130 calendar days. The plaintiff received notice to proceed on March 6, 1940, and thereby July 14, 1940, was the time limit for completion. The turbo-alternator was not received on the job until July 8, 1940, and its installation was completed on August 10, 1940. Judge Madden, who delivered the opinion of the Court, stated in part as follows (98 C. Cls. 543, 551-552):

> "* * * Here no 'other contracts for additional work' were let, with which plaintiff could cooperate, or with the performance of which he might interfere. We do

not think that the fact that the Government was buying from a manufacturer, either ready made or made to order, the machine which plaintiff contracted to install, meant that plaintiff must accommodate himself to the performance of the seller of the machine by waiting around indefinitely for it to be delivered.

* * *

"We do not read the case of *United States* v. *Rice, et al.*, 317 U. S. 61, decided November 9, 1942, as meaning that the Government can, without any privilege reserved in the contract and without any consideration whatever for the damage caused to the contractor, delay the performance of the contract as much as it pleases, and pay the bill for the damage merely by refraining from assessing liquidated damages against the contractor for his late completion. If the Government should expressly reserve such an unreasonable privilege in its contracts it should pay heavily for the privilege in the increased amounts of bids which prudent contractors would submit. We see no reason why the Government should want such a privilege, or should be willing to pay for it. And we see no reason why it should get such a privilege without reserving it or paying for it, as we think it did not do in this case.

"In the *Rice case, supra,* because of unforeseen soil conditions, it was impossible to build the building into which the plumbing contractor, the plaintiff in that case, was to install his plumbing, and the building had to be redesigned and relocated with consequent delay. There was nothing inconsiderate or unreasonable about the Government's conduct in that case, which contributed to the delay, or which would have amounted to a breach of contract even as between ordinary persons."

In *Walter A. Rogers et al.* v. *United States,* 99 C. Cls. . ., decided April 5, 1943, recovery of increased costs by reason of an unreasonable Government delay was permitted. Judge Marvin Jones, who delivered the unanimous opinion of the Court, stated in part as follows:

"It is contended that the recent decision of the Supreme Court in the *Rice* case is controlling, and should prevent recovery by the plaintiffs. We do not think

so. In that case the delay was caused by unforeseen conditions which were not the fault of anyone, and a method for making adjustments, in the event unforeseen conditions should develop, was specified in the contract. That remedy has been invoked. We do not construe the *Rice* case as holding that affirmative wrongful action or failure of the defendant to discharge its obligations under the contract could be cured by simply waiving liquidated damages. The liquidated damages clause is placed in the contract for the protection of the defendant. If it were held that the simple waiver of such a penalty clause were all the relief that could be secured by plaintiffs, regardless of the added expense of labor, bonds, interest, rental of machinery and other costs, and regardless of how long a delay might be occasioned by the defendant, then the plaintiffs would have no protection from wrongful acts or from negligent failure of the defendant to perform its obligations under the contract. We do not think the officials of the defendant should be permitted to 'kick the contractor all over the lot' and escape responsibility by merely waiving the right to collect liquidated damages, regardless of what the additional costs to him might be. If such a construction were made, it would certainly cost the defendant heavily in the form of higher bids in all future contracts. Neither the language of the opinion nor the issue involved in the *Rice* case justifies any such construction."

It is respectfully submitted that *United States* v. *Rice, supra,* and *Crook Co.* v. *United States, supra,* are inapplicable to the contract and facts and circumstances which exist here.

II. It is Well Settled that a General Contractor May Recover His Increased Costs and Expenses Brought About by an Unreasonable Government Delay.

There have been numerous decisions involving the recovery of increased costs and expenses brought about by unreasonable Government delays. The decision in each case must necessarily rest upon a consideration of the nature of

the contract, its language, and the facts and circumstances which exist. There is set forth below a partial list of such cases, including decisions construing construction contracts entered into by general contractors after the adoption of the standard form.[3]

Mr. Justice Black, who rendered the opinion of the Court, in *United States* v. *Rice, supra,* also stated, "cf. *United States* v. *Smith,* 94 U. S. 214, 217, 24 L. ed. 115." When that case is compared, it is found that the contractual situation there was wholly unlike that which existed in *United States* v. *Rice.*

In *United States* v. *Smith, supra,* it was held that Smith, a general contractor, who was to furnish the material and erect the buildings, was entitled to recover damages due to a stoppage of the work by the Government. Chief Justice Waite, who delivered the opinion of the Court, stated in part as follows:

> "In Clark's case, 6 Wall., 546, 18 L. ed., 917, it was decided that the United States were liable for damages resulting from an improper interference with the work

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[3] *United States* v. *Smith,* 94 U. S. 214; *U. S.* v. *Mueller,* 113 U. S. 153; *William Cramp & Sons Ship & E. B. Co.* v. *U. S.,* 216 U. S. 494; *Ripley* v. *U. S.,* 223 U. S. 695; *U. S.* v. *Spearin,* 248 U. S. 132; *U. S.* v. *Wyckoff Pipe & C. Co.,* 271 U. S. 263; *Figh* v. *U. S.,* 8 C. Cls. 319; *Harvey* v. *U. S.,* 8 C. Cls. 501; *Kellogg Bridge Co.* v. *U. S.,* 15 C. Cls. 206; *Kelly & Kelly* v. *U. S.,* 31 C. Cls. 361; *Ernest J. Cotton, et al.* v. *U. S.,* 38 C. Cls. 536; *Cramp & Sons* v. *U. S.,* 41 C. Cls. 164; *The Snare & Triest Co.* v. *U. S.,* 43 C. Cls. 364; *Owen* v. *U. S.,* 44 C. Cls. 440; *John C. Rodgers, et al.* v. *U. S.,* 48 C. Cls. 443; *Moran Brothers Company* v. *U. S.,* 61 C. Cls. 73; *Edge Moor Iron Company* v. *U. S.,* 61 C. Cls. 392; *Julius Goldstone, et al.* v. *U. S.,* 61 C. Cls. 401; *Detroit Steel Products Co.* v. *U. S.,* 62 C. Cls. 686; *McCloskey* v. *U. S.,* 66 C. Cls. 105; *Steel Products Engineering Co.* v. *U. S.,* 71 C. Cls. 457; *Levering & Carrigues Co.* v. *U. S.,* 73 C. Cls. 566; *Donnell-Zane Co.* v. *U. S.,* 75 C. Cls. 368; *Harry D. Carroll, et al.* v. *U. S.,* 76 C. Cls. 103; *Karno-Smith Co.* v. *U. S.,* 84 C. Cls. 110; *Phoenix Bridge Co.* v. *U. S.,* 85 C. Cls. 603; *Wharton Green & Co., Inc.,* v. *U. S.,* 86 C. Cls. 100; *Plato* v. *U. S.,* 86 C. Cls. 665; *Sobel* v. *U. S.,* 88 C. Cls. 149; *Edward E. Gillen Co.* v. *U. S.,* 88 C. Cls. 347; Ouilmette *Construction and Engineering Co.* v. *U. S.* 89 C. Cls. 334; *Gustav Hirsch,* 94 C. Cls. 602; *J. L. Young Engineering Co., Ltd.,* v. *U. S.,* 98 C. Cls. 310.

of a contractor; and in Smoot's case, 15 Wall., 47, 21 L. ed., 110, that the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party. The same rules were applied in the case of the Mfg. Co., 17 Wall., 592, 21 L. ed., 715. Here the work was stopped by order of the United States. Smith asked to be released from his contract, unless he could go on. This was refused until the expiration of sixty days, when he was allowed to resume. As between individuals, certainly this would be considered an improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension. The United States must answer according to the same rule. In this respect, we cannot consider this case different in principle from that of Clark (supra)."

In *United States* v. *Mueller*, 113 U. S. 153, it was held that under contracts to furnish stone to the United States for a building, and to saw it and cut and dress it, all as required, the contractor may recover damages for enforced suspensions of and delays in the work, by the United States, arising from doubts as to the desirability of completing the building with the stone and on the site, which involved the examination of the foundation and the stone by several commissions.

In *William Cramp & Sons Ship & E. B. Co.* v. *United States*, 216 U. S. 494, it was held that a certain qualified release did not foreclose certain claims against the United States, and the case was remanded to the Court of Claims with instructions to enter judgment for $49,792.66, which that Court had determined as the damage because of several failures and delays of the United States with respect to the furnishing of the armor for the battleship involved in that case, and the delay in her completion and difficulties experienced in her construction consequent thereon.

In *United States* v. *Wyckoff Pipe & C. Co.*, 271 U. S. 263, decided May 24, 1926, after *Crook Co.* v. *United States*, 270 U. S. 4, decided January 25, 1926, it was recognized that

the contractor there was entitled to recover damages for Government delay, and it was held that the correct measure of damages for the delay is the loss actually sustained by the contractor as the result of the delay.

Each of the parties to a contract has some obligation to respect the rights of the other party. *United States* v. *Speed*, 8 Wall. 77, 84; *United States* v. *United Engineering and Contracting Co.*, 234 U. S. 236.

In the case of general contractors performing the general construction where the time for commencing the work and the allowable time for completion are fixed by the contract, it is well settled that the Government should bear the increased costs and expenses incident to unreasonable Government delays, in the absence of provisions in the contract relieving the Government of responsibility or liability for damages for delay, and that the mere extension of the contract time for the period of delay will not serve to defeat reimbursement to contractors for such losses. The decisions to this effect are harmonious, and have been repeated from time to time over a long period of years.

As the standard form of construction contract has been authoritatively construed in this manner by repeated and consistent decisions, and contracts have been entered into by general contractors and the Government in the face of such interpretation, isn't it fair to assume that that construction is well embedded in the contract and bears no intent to disclaim responsibility or liability for damages for delay? Contracting officers of the Government and general contractors are acquainted with the interpretation placed on the standard form of construction contract. In view of that interpretation, isn't it also fair to assume that if the Government wished to escape such liability, it would insert in the contract appropriate language to that end?

If the Government desires to shift to general contractors increased costs and expenses which may flow from the Government's failure to fulfill its responsibilities and obligations, it should be willing to pay general contractors for this assumption of risk through higher bid prices for its work.

The Government is entitled to have its construction work done by contract in an expeditious manner at the lowest possible cost and this can only be accomplished if the Government's plans and specifications are reasonably definite and certain, and the rights and obligations of the parties are known in advance of bidding, because otherwise the invitation for bids will not attract sufficient bidders to produce an economical price for the work.

In the case at bar, the Government elected to have the mechanical work performed through another contractor. The fact that the Government performed this work through a third party does not relieve it of the obligation to see that the work is done in a timely manner. The obligation was to do the work in harmony with the other work, and there was a serious failure in this respect. The Government could have terminated the mechanical contractor's right to proceed in time to prevent the unreasonable delay, but it failed to do so. The Government in its invitation to bid stated that the work would be awarded to a responsible bidder, but the Government failed to do so. If mechanical contracts are to be awarded by the Government to bidders who are not responsible, then general contractors would hesitate to bid the general construction. The Government is responsible for the defaults of its mechanical contractor in the same manner as a general contractor is responsible for the defaults of his subcontractors.

III. Where a Contract for General Construction Provides That the Work is to be Completed Within 420 Calendar Days After Date of Receipt of Notice to Proceed the General Contractor Has the Right to Finish in Less Time.

Article 1 of the contract for general construction in this case provided that, "Performance will begin within ten (10) calendar days after date of receipt of notice to proceed and will be completed within four hundred and twenty (420) calendar days after date of receipt of notice to pro-

ceed * * *." (Finding 2, Tr. p. 32) Article 9 of the contract provided that, "if the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion *within the time specified* in Article 1, or any extension thereof, or fails to complete said work *within such time*, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay." Article 9 also provided that, "If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; * * *." The amount of liquidated damages specified was $175 per day. (Finding 9, Tr. p. 37) (Italics supplied.)

The respondent had the duty to complete the contract *within* 420 calendar days, and also the right. He had the right to use all of the time without the imposition of liquidated damages, and he had the right to use less time. When the contract provided for completion within 420 calendar days, it meant exactly what it stated. The contract did not say that the general construction was to be completed in not less than nor more than 420 calendar days. That would not be sensible, and would be repugnant to the very nature of the contract.

There is hardly any need to refer to lexicographers to ascertain the meaning of the term *within*, but in any event Webster's New International Dictionary defines *within* to include the following:

> "* * * inside of; not without; * * * in the limits or compass of; specif.: * * * b Not longer in time than; as, *within* an hour. * * * Hence, inside the limits * * * of;

not going outside of; not beyond * * * preceding in time; earlier than; before * * *."

The respondent had the responsibility and the right to schedule the job for completion. In accordance with the usual practice in such cases the respondent shortly after his contract was entered into prepared a progress schedule showing that he planned and intended to finish all the work called for by his contract and the specifications by November 1, 1934, a period of 314 calendar days from the date of receipt of notice to proceed, and he computed his bid on that basis. (Finding 9, Tr. 37-38)

In ESTIMATING BUILDING COSTS by Frank E. Barnes, C. E., it is stated in part as follows (pp. 14-15):

> "Schedule of Construction.—It is advisable on a job of any magnitude to make out a schedule in advance, showing in detail when each part of the work is to begin, when it is to reach certain definite stages and when it should be completed. This schedule should show when each kind of material is needed at the job, the quantities required, the order of delivery and the time of completion. Every material man should be informed well in advance when he should commence to furnish material, how fast the material will be required, and when he is to complete the delivery. It is a good thing to consult the field superintendent in preparing the construction schedule as his knowledge will be of assistance in this work. It will also make him more responsible in carrying out the requirements in order to complete the job at the proposed completion date."

A general contractor constructing a large hospital building excluding the mechanical work, may award subcontracts for (1) wrecking and removing existing buildings, (2) excavation, filling and grading, (3) foundations, (4) structural steel, including erection, (5) brick work, (6) concrete work, including reinforced floors and pavements, (7) stonework, (8) iron and steel balconies, stairs, (9) ornamental iron, (10) ornamental brass, bronze, (11) architectural terra cotta, (12) roofing, (13) lathing and plastering,

(14) waterproofing, (15) sheet metal work, (16) glazing, (17) interior trim, cabinet work, (18) hollow metal doors, frames, transoms, (19) painting, (20) cleaning, and other work and materials.

A general contractor will secure several bids on each branch of work, and his bid to the Government is a total of the lowest responsible bids, plus bond premium, workmen's compensation insurance, social security taxes, supervisory personnel, overhead and profit. Upon the award of the contract by the Government, the general contractor sublets the work to be done by others. A great deal of the material which goes into the job must be specifically fabricated. A construction job must be handled as a well planned coordinated operation with material and articles flowing to the job according to a well conceived schedule. Any unreasonable delay during contruction plays havoc with a job, and is very disturbing to the contractual relationships which exist between a general contractor and his subcontractors, whose rights must also be respected.

No large building construction job can be efficiently and economically performed without a prearranged schedule for performance.

A complete answer to the question as to whether Algernon Blair possessed the right to complete performance of the contract in less than 420 calendar days, which was the maximum number of delays allowed for performance, is found in a decision by this Court in *Guerini Stone Co.* v. *P. J. Carlin Constr. Co.*, 248 U. S. 334. That case involved a suit by a subcontractor against a general contractor respecting the construction of a federal postoffice and court building at San Juan, Porto Rico. P. J. Carlin Construction Co., the general contractor, was to construct the foundation complete to the basement floor. Upon this, Guerini Stone Co., was to construct the principal part of the building, including exterior and interior walls, floors, and roof, to be built of concrete. For this work and the necessary materials, the P. J. Carlin Construction Co., was to pay Guerini Stone Co., $64,750 in certain monthly installments

on account and the balance on completion. The work was to be done in 300 days. After the work had been in progress for some time a disagreement arose concerning payments on account. In February, 1912, the government superintendent of construction found a serious settlement in the foundation, as a result of which the work was ordered to be stopped, and thus matters remained until May 22, 1912, when the Guerini Stone Co., terminated and rescinded the contract because of the inability to get payments and inability to proceed with the work. This Court held that under the circumstances which existed, Guerini Stone Co., was justified in declining to go on with the work, and was entitled to recover damages. Mr. Justice Pitney, who delivered the opinion of the Court, stated in part as follows (p. 341):

> "* * * In our opinion there was error in holding that the provisions of the 6th and 7th paragraphs limited, thus, the provisions of the 11th. *From the fact that by paragraph 6 plaintiff was obliged to finish the work in 300 days, and by paragraph 7 this time was extended for plaintiff's benefit in the case of delays caused by the owner, the general contractor, or otherwise, as specified, it does not follow that plaintiff was not entitled to finish the work more speedily if it could do so;* or that a breach of paragraph 11 by defendant, so serious as to result in a total suspension of the work, with no reasonable prospect that it could be resumed within any reasonable time, left plaintiff still under an obligation to hold itself in readiness to proceed, and without remedy except an action for damages under that paragraph." (Italics supplied)

In *J. L. Young Engineering Co., Ltd.* v. *United States*, 98 C. Cls. 310, decided February 1, 1943, after the decision of this Court in *United States* v. *Rice, supra*, it was recognized that the contractor there had the right to finish in less time than the maximum period allowed for performance. Judge Madden, who delivered the unanimous opinion of the Court, stated in part as follows (p. 324):

"We have found that the plaintiff was delayed ninety days by the defendant's lateness in furnishing the drawings and models. * * *

"The defendant asserts that plaintiff could not have been delayed more than seventy days because it completed the job within seventy days after the date called for in the contract. But the evidence persuades us that, if plaintiff's work had not been delayed by the defendant's breach of contract, it would have completed it some time before the agreed date. The contract contained no promise that plaintiff would not complete the work before the agreed date, and gave the defendant no right to unreasonably prevent earlier completion. *Blair* v. *United States*, No. 43548, decided October 5, 1942. (99 C. Cls. —)"

The Court of Claims properly rejected the suggestion that the measure of damages was dependent on the number of days consumed after the time limit for performance.

In *Harvey* v. *U. S.*, 8 C. Cls. 501, 510, Judge Milligan, who delivered the opinion of the Court, stated in part as follows:

"* * * To fulfill this part of their obligation, the claimants had the undoubted right to push the work forward as rapidly as practicable, without any hindrance or delay on the part of the defendants. But they were not left free to exercise this right, but hindered and delayed by the agents of the United States failing to fulfill their part of the contract, for which we have awarded damages."

In *Karno-Smith Co.* v. *United States*, 84 C. Cls. 110, wherein recovery was allowed for two unreasonable Government delays in the construction of the United States Post Office and Court House at Trenton, N. J., the building was to be completed within 480 calendar days, and the time limit for completion was January 16, 1933. The general contractor there scheduled the job for completion by the end of September, 1932. The Government delayed construction a total of 75 days, but notwithstanding this the contractor finished the building in the early part of Feb-

ruary, 1933, about a month after the time limit specified in the contract. The Court of Claims permitted recovery of the actual damages suffered for the 75 days of delay notwithstanding the fact that contractor completed the building within about a month after the time limit.

The recovery of increased costs and expenses incident to an unreasonable Government delay cannot be made to depend on the amount of time consumed by a general contractor after the expiration of the time limit named in the contract for performance. This Court in *United States* v. *Smith*, 94 U. S. 214, and *United States* v. *Wyckoff Pipe & Creosoting Co.*, 271 U. S. 263, recognized that the United States can be required to make compensation to a contractor for damages which he has actually sustained by their default in the performance of their undertakings to him. The computation of damages suffered is in no sense determinable by the amount of time consumed after the expiration of the time limit.

If the Government unreasonably delays a general contractor during performance, and there is no stipulation in the contract excusing the Government of responsibility or liability for damages for the delay, the Government is liable for the increased costs and expenses reasonably traceable to the delay, regardless of any overrun on time. If overrun on time was used as the measure for computing damages, this would lead to absurd results.

Suppose a general contractor has 420 calendar days within which to complete a building, and suffers during the course of construction two separate unreasonable delays for which the Government was responsible. Suppose a delay of 60 days occurs because the contracting officer's representative at the job does not like the color of the brick, but later decides that it is all right, and by reason of this delay, the brick subcontractor walks off the job, and the work has to be relet to another brick subcontractor at an increased cost of $35,000.00 over and above the subcontract price which was used in submitting the low competitive bid for

the general construction. Suppose another delay of 90 days occurs because the Government failed to release in time an old building which was to be remodeled under the contract. Suppose the general contractor finishes the job 30 days after the time limit. What is the measure of damages? Can he recover his actual damage? Is he to forfeit his loss of $35,000.00 on the brick work, and recover only the superintendence and overhead for a period of 30 days, the time consumed beyond the limit used in the contract?

Is the rule as to the measure of recoverable damages variable with the speed of a general contractor in performing the work, so that the efficient contractor is to be denied recovery, while the inefficient contractor is to be recompensed? The Government wants its buildings completed as early as possible, and any rule which promotes lack of diligence is harmful to the Government. In the case at bar, the Government requested completion earlier than the time limit named, so that there can be no controversy as to the intention of the parties as to the right possessed by the respondent under the contract to complete in less time than 420 calendar days.

The rule as to the measure of damages as laid down by this Court does not admit of the suggestion that if a general contractor is so efficient and energetic that notwithstanding a serious Government delay, the job is finished without any extension of the contract time, he forfeits his right to recover his damages.

IV. The Act of a Contracting Officer in Granting a General Contractor an Extension of the Contract Time Because of a Government Delay Does Not Relieve the Government of Liability for Losses Due to the Delay, Unless the Contract Disclaims Responsibility or Liability for the Delay.

It is a well established principle that the act of a contracting officer in granting a general contractor an extension of the contract time in which to complete a contract

equal to the delay caused by the Government does not relieve the Government of liability for increased costs and expenses brought about by an unreasonable Government delay, unless the contract in terms disclaims responsibility or liability for the delay.

In the case at bar, there was no extension of the contract time because of the unreasonable Government delay, because none was necessary, and there were no liquidated damages imposed against the respondent.

In *Levering & Carrigues Co.* v. *U. S.*, 73 C. Cls. 566, Judge Williams, who announced the opinion of the Court, made the following pertinent observation (at p. 577):

> "The act of the contracting officer in granting the plaintiff an extension of time in which to complete the contract equal to the delay caused by the Government does not relieve the defendant from liability to the plaintiff for losses sustained by it by reason of such delay. *Crook Co.* v. *United States*, 59 C. Cls. 348; *William Cramp & Son* v. *United States*, 41 C. Cls. 164."

In *Edge Moor Iron Co.* v. *U. S.*, 61 C. Cls. 392, Judge Hay, speaking for the Court, said (at p. 396):

> "* * * To hold that the granting of additional time, made necessary by the default of the Government precludes the plaintiff from the recovery of damages if otherwise entitled thereto would be reading into the contract a provision not in the minds of the parties when the contract was entered into."

In *Moran Brothers Company* v. *U. S.*, 61 C. Cls. 73, Chief Justice Campbell, on behalf of the Court, stated in part as follows (at p. 102):

> "The contract provides that 'all delays that the Secretary shall find to be properly attributable' to the Government should entitle the plaintiff to a corresponding extension of time. The Secretary, granting extensions, recited that the delays were beyond plaintiff's control, and in one or more of his extensions recognized that the delay was caused by the Government's failure to sup-

ply armor or ordnance. The provision that delays attributable to the Government would entitle the contractor to a corresponding extension of time protects him against the deductions for liquidated damages during such period but does not contemplate immunity to the defendant for delays caused by its failure to observe its own obligation."

In *Karno-Smith Co.* v. *U. S.*, 84 C. Cls. 110, 122, Chief Justice Whaley, who delivered the opinion of the Court, stated in part as follows:

"* * * The mere fact that the Government had granted an extension of time for the completion of the contract, due to the fact that it had delayed the plaintiff, does not relieve it of the responsibility for the damages incurred by the plaintiff due to these delays. *Edge Moor Iron Company* v. *United States*, 61 C. Cls. 392; and *Julius Goldstone et al.* v. *United States*, 61 C. Cls. 401. The plaintiff is entitled to recover on this item."

To the same effect, please see *Walter A. Rogers et al.* v. *United States*, 99 C. Cls. —; *Robert Grace Contract. Co.* v. *Chesapeake & O. N. Ry. Co.* (C. C. A. 6), 281 F. 904, 907; *Selden Breck Const. Co.* v. *Regents of U. of Michigan*, 274 F. 982; *American Concrete Steel Co.* v. *Hart* (C. C. A. 2) 285 F. 322. In *Selden Breck Const. Co.* v. *Regents of U. of Michigan, supra*, District Judge Tuttle said in part as follows (274 F. 982, 984):

"* * * In the absence of an express stipulation relieving the defendant from liability for damages caused by its breach of this contract, it would, of course, be liable therefor. * * *"

The mere extension of the contract time because of unreasonable Government delays or other defaults can in no sense be considered reimbursement to a general contractor for increased costs and expenses. A general contractor in the construction of a $2,000,000.00 building might have included in his bid an anticipated profit of 5%, or

$100,000.00, and yet suffer losses amounting to $200,000.00 because of an unreasonable Government delay. The extension of time was never intended as reimbursement for losses due to delay. Delays during construction cost money, not merely time. The clause for an extension of time for unforeseeable causes beyond the control and without the fault or negligence of the contractor was probably inserted to let bidders know that they would not be penalized for such causes, and in that way, it would attract bidders, who otherwise might be scared away.

This Court considered the liquidated damage clause in *United States* v. *Brooks-Callaway Company*, No. 366, decided February 1, 1943, 87 L. ed. 438 (advance opinions) —— U. S. ——, which involved the propriety of the assessment of liquidated damages for delay against a contractor under Article 9 of the contract in view of the proviso, reading in part, "Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes *beyond the control and without the fault or negligence of the contractor*, including, but not restricted to, * * * floods, * * * and unusually severe weather or delays of subcontractors due to such causes: . . ." Mr. Justice Murphy, who delivered the opinion of the Court, stated in part as follows (at pp. 439-440):

> "Respondent brought this suit in the Court of Claims to recover the sum of $3,900 which was deducted from the contract price as liquidated damages for delay in completion of a contract for the construction of levees on the Mississippi River. The contract was not completed until 290 days after the date set, and liquidated damages in the amount of $5,800 (figured at the contract rate of $20 for each day of delay) were originally assessed. Respondent protested, and upon consideration the contracting officer found that respondent had been delayed a total of 278 days by high water, 183 days of which were due to conditions normally to be expected and 95 days of which were unforeseeable. He

recommended that liquidated damages in the amount of $1,900 (representing 95 days of unforeseeable delay at $20 per day) be remitted and that the balance of $3,900 be retained. Payment was made on this basis.

"The Court of Claims held that liquidated damages should not have been assessed for any of the 278 days of delay caused by high water because the high water was a 'flood' and under the proviso all floods were unforeseeable per se. Accordingly, it gave judgment in respondent's favor in the sum of $3,660. No findings were made as to whether any of the high water was in fact foreseeable. • • •

"We believe that the construction adopted below is contrary to the purpose and sense of the proviso and may easily produce unreasonable results. The purpose of the proviso is to remove uncertainty and needless litigation by defining with some particularity the otherwise hazy area of unforeseeable events which might excuse nonperformance within the contract period. Thus contractors know they are not to be penalized for unexpected impediments to prompt performance; and, *since their bids can be based on foreseeable and probable,* rather than possible hindrances, *the Government secures the benefit of lower bids and an enlarged selection of bidders.*

• • • •

"A logical application of the decision below would even excuse delays from the causes listed although they were *within the control, or caused by the fault of the contractor,* and this despite the proviso's requirement that the events be '*beyond the control and without the fault or negligence of the contractor.*' • • • *Any contractor could shut his eyes to the extremest probability that any of the listed events might occur, submit a low bid, and then take his own good time to finish the work free of the compulsion of mounting damages, thus making the time fixed for completion practically meaningless and depriving the Government of all recompense for the delay.*" (Italics supplied)

A contractor's bid price should include every foreseeable and probable cost to do the work described in the Government's plans and specifications. When the Government en-

joys the benefit of the lowest bid for the contract work, it has the duty under the contract to permit the contractor to perform the work diligently to completion in an orderly and efficient manner. To hold that the Government could shut its eyes to its inherent obligations under the contract, and then take its own good time in fulfilling its responsibilities and be free of the compulsion of mounting damages suffered by a contractor because of an unreasonable delay of the Government through the simple process of granting an extension of the contract time for such delay, would indeed be shocking. Such a rule would promote and encourage lack of due diligence by Government officers, and would tend to retard the time when the Government could begin to realize the benefit of its investment under the contract.

The selection of the mechanical contractor in this case was a matter within the control of the Government, and when it selected a mechanical contractor who was unable to do the work, and then failed to timely terminate his right to proceed so as to avoid unreasonable delay to the respondent, the Government was certainly not without fault.

The Government is responsible for the defaults of its mechanical contractor in the same manner as a general contractor is responsible for his mechanical subcontractor when that work is included in the general construction.

The Government in this case fixed the time within which the entire work was to be completed as 420 calendar days. The Government allows a reasonable time for completion so as to attract bidders. If the general contractor fails to exercise such diligence as will insure completion within the fixed time, the Government has the right either to assess liquidated damages against the general contractor for delay beyond the 420 calendar day period, or to terminate the general contractor's right to proceed and charge any excess cost of performance over the contract price to the general contractor and his surety.

The imposition of liquidated damages against a contractor is an appropriate means of inducing due performance

within the contract period allowed for completion, and in the event of delay by the contractor beyond the period allowed, of providing compensation to the Government. The liquidated damages are a certain amount for each day of delay beyond the fixed limit of time for completion.

In *Robinson* v. *United States*, 261 U. S. 486, 488, Mr. Justice Brandeis, who delivered the opinion of the Court, stated in part as follows:

> "The provision is not against public policy. The law required that some provision for liquidated damages be inserted. Act of June 6, 1902, chap. 1036, sec. 21, 32 Stat. at L. 310, Comp. Stat. sec. 6922, 8 Fed. Stat. Anno. 2 ed. p. 393. In construction contracts a provision giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform; and courts give it effect in accordance with its terms. Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 673, 474, 46 L. ed. 366, 382, 22 Sup. Ct. Rep. 240; Wise v. United States, 249 U. S. 361, 63 L. ed. 647, 39 Sup. Ct. Rep. 303; J. E. Hathaway & Co. v. United States, 249 U. S. 460, 464, 63 L. ed. 707, 709, 39 Sup. Ct. Rep. 346. * * *"

This decision was followed in *George F. Pawling & Company* v. *United States*, 273 U. S. 665, by a per curiam decision.

The liquidated damage clause was inserted in the Government construction contract for the benefit of the Government, not for the benefit of the contractor. The Government thereby is relieved of the expense and difficulty of proving actual damages by reason of a belated delivery of a building by the contractor. The Government could sue for actual damages in the absence of the liquidated damage clause.

When a contractor is unreasonably delayed by the Government, he does not collect liquidated damages from the Government, but must prove his actual damages. In this manner, the mutuality of obligation and responsibility is preserved.

The extension of the contract time for Government delay relates strictly to the subject of liquidated damages, and has nothing to do with the subject of the Government's liability to a general contractor for increased costs and expenses incident to an unreasonable Government delay. The extension of time puts the matter of assessment of liquidated damages beyond dispute. A general contractor is at least free from liquidated damages for the contract period plus any extension of time.

V. Where a Contract for General Construction Specifies the Time Within Which Performance is to be Completed, and Provides for the Payment of Liquidated Damages for Delay, Time is of the Essence of the Contract.

When a contract for general construction specified that the work is to be completed within a certain number of calendar days after the receipt of notice to proceed, and upon failure to prosecute the work with such diligence as will insure its completion within the time specified, the contract may be terminated by the Government, or liquidated damages of a certain amount for each day of delay beyond the time limit named are payable by a general contractor, time is definitely of the essence of the contract, and in such a situation it is well established that there is an implied obligation on the part of the Government that the contractor will be permitted to prosecute the work in an orderly and efficient manner without unreasonable delay. The Courts in a number of decisions have recognized that time is of the essence in such contracts.

In *Griffin Mfg. Co.* v. *Boom Boiler & Welding Co.*, (C. C. A. 6), 90 F. (2d) 209, 212, certiorari denied, 302 U. S. 741, Circuit Judge Allen, who delivered the opinion of the Court, stated in part as follows:

> " * * * But in every contract for the doing of work there is an implied agreement that the contractor will not be delayed or obstructed by the person for whom

the work is to be done. Hart v. American Concrete Steel Co. (D. C.) 278 F. 541, affirmed 285 F. 322 (C. C. A. 2). * * *"

In *Owen* v. *Giles et al.*, (C. C. A. 8), 157 F. 825, 828, involving a contract for railroad construction, it was also held that time was of the essence of the contract, and Circuit Judge Hook, who delivered the opinion of the Court, stated in part as follows:

"* * * Though a contract does not expressly so provide, time may nevertheless be of the essence when other conditions manifest its importance. In the case at bar definite times for completion were expressed in the contracts. * * *"

In *Montrose Contracting Co., Inc.* v. *Westchester County,* (C. C. A. 2), 94 F. (2d) 580, 582, certiorari denied 304 U. S. 561, involving a sewer contract, it was stated in part as follows:

"The contract included not only the terms 'set forth in express words, but in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made.' Sacramento Nav. Co. v. Salz, 273 U. S. 326, 329, 47 S. Ct. 368, 369, 71 L. ed. 663. * * *"

In *Sacramento Navigation Co.* v. *Salz,* 273 U. S. 326, 329, Mr. Justice Sutherland in behalf of this Court, said in part as follows:

"* * * But a contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made. (3 Williston, Contr. sec. 1293; Brodie v. Cardiff Corp. (1919) A. C. 337, 358—H. L.), and there is no justification here for going beyond the contract actually made to invoke the conception of an independent implied contract."

In a contract for general construction, there are many implied provisions aside from the right to prosecute the work in an orderly and efficient manner without unreasonable delay. A general contractor has the right to sublet parts of the work, he has the right to schedule the time of beginning and completion of various parts of the work, he has the right to do the work in an economical manner and he has the right to do the work according to a generally accepted approved method. There are numerous other implied conditions which are inherent in contracts of this nature.

The rights, responsibilities and obligations of each party to a contract for general construction should be respected and observed. In such contracts, time is of the essence of the contract as to each party. It is an essential part of the bargain. No intelligent bid can be submitted without taking the element of time into consideration.

Articles 3 and 4 of the contract do not contemplate any unreasonable delays in the performance of the original contract work. In the case of a large building, there may be about 25 to 75 changes made during the course of construction without any extension of the contract time, and without any appreciable delay, but when the Government unreasonably delays the performance of the contract work through a failure to fulfill a responsibility or perform an obligation in a timely manner, this is a very serious violation of the general contractor's rights which may not only destroy the fruits of his contract, but might result in his financial ruin.

VI. Where the Court of Claims Makes a Finding of Fact as to the Amount of Increased Costs, Including a Certain Amount for Office Overhead, Resulting from an Unreasonable Government Delay, this Finding Should Not Be Disturbed.

The Court below made a finding of fact as follows:

> "Plaintiff was unreasonably delayed in the completion of the work called for by his contract for a period of 3½ months, as a result of which he incurred and paid the following increased costs in excess of the costs included in the contract price and in excess of the costs which he would otherwise have incurred except for such delay:
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> | | |
> |---|---|
> | Salaries of supervisory and clerical forces at Roanoke for 3½ months... | $11,344.40 |
> | Overhead expenses at Montgomery office for 3½ months ..... | 18,093.52 |
> | Liability and compensation insurance... | 4,661.07 |
> | Heating cost ..... | 4,124.73 |
> | Field expenses, resulting from delay in furnishing Boiler House ..... | 290.89 |
> | Cost of grading, roads and walks..... | 12,734.91 |
> | Total ..... | $51,249.52" |

(Finding 14, Tr. 44)

In the Government's petition for the writ (p. 16), the following is assigned as error,

> "(2) In including general office overhead in the computation of damages for delay in the absence of any finding that such overhead resulted solely from such delay."

In *United States* v. *Wyckoff Pipe & C. Co.*, 271 U. S. 263, this Court reiterated the rule that the correct measure of damages for Government delay is the loss actually sustained by the contractor as the result of the delay. The Court of Claims in that case erroneously used the excess of

the reasonable value of the work at the time it was done over the amount paid therefor. Mr. Justice Brandeis, who delivered the opinion of the Court, stated in part as follows (pp. 266-268):

"The government contends that recovery cannot be had on the contract for the higher market value of the work at the time it was actually performed; that the correct measure of damages for its delay is the loss actually sustained by the contractor as the result of the delay (United States v. Smith, 94 U. S. 214, 24 L. ed. 115; United States v. Mueller, 113 U. S. 153, 88 L. ed. 946, 5 Sup. Ct. Rep. 380; Ripley v. United States, 223 U. S. 695, 56 L. ed. 614, 32 Sup. Ct. Rep. 352); that the increase in the market value of materials purchased for use on the contract cannot be deemed a loss; and that to assess damages on the basis of the value of the work at the time it was performed was, in effect, to make a new contract for the parties or to allow recovery as upon quantum meruit. The contention is, in our opinion, well founded.

"The contractor urges that the long delay was a breach which would have justified it in terminating the contract and refusing to do the work except under a new one at an increased price. But, despite a contention to the contrary, it did not do this. It completed the work under the contract as originally made. It did not attempt to make a new contract, or to modify the existing one. It sought merely to reserve its right to make a claim for the damages resulting from the government's delay. After completing performance it brought this suit declaring on the original contract.

"* * * The contractor's contentions, however, ignore the rule that damages for delay are limited to the actual losses incurred. * * *

"It is argued that the court of claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at its results; that itemization is often impossible; and that, like a jury, the court may make an estimate and return such sum as the damages recoverable (compare United States v. Smith, 94 U. S. 214, 219, 24 L. ed. 115, 116), and that, accepting the rule that damages are to be limited to actual loss, the award of the lower court is to be re-

garded as an estimate of such loss. But, in the case at bar, the court did not pursue that course. It made no estimate of the loss suffered. It found merely the increase in value of the work at the time it was performed and the increase in value of the materials during the period of delay. Then it found and concluded, as a matter of law, that the excess of the reasonable value of the work at the time it was over the amount paid therefor, was recoverable as damages. This was error."

The controversy here relates to the item of overhead expenses at Montgomery office for 3½ months $18,093.52.

There was the absence of the use of the word *solely* in this finding, and its use was wholly unnecessary. The finding as written is clear and precise, and meets the test laid down by this Court. It shows the amount of the loss actually sustained by the respondent as a result of the unreasonable delay.

Office overhead, like job overhead, costs money, and a construction job of substantial size cannot be performed without such expense. Office overhead must be spread out over the jobs in progress. The amount of such expense necessarily depends on the amount and nature of the work, and the time required for completion. Job overhead can be computed with greater accuracy than office overhead, but that is no sufficient reason for the denial of such costs in the calculation of the damages ascribable to an unreasonable delay. A contractor's main office force may devote its entire time and energy to the completion of one Government contract, and not take any other work pending the completion of that job, in which event the entire cost is allocable to that job. A contractor may be sole proprietor whose salary together with salaries of two clerks may be carried on the office payroll, and devote half of their time to the performance of a Government contract. The determination of the cost of office overhead ascribable to a particular job for an unreasonable Government delay requires careful scrutiny of the evidence. It is a function to

be performed by the Court below, and its finding of fact on the same should not be disturbed by this Court.

In ESTIMATING BUILDING COSTS (1931) by Frank E. Barnes, C. E., it is stated in part as follows (pp. 11-14):

> "General Office Expense.—This expense is variable depending upon the size of the office force which the contractor keeps and the amount of work performed during the year. This can best be determined by any given concern from its own records, providing it has been in business long enough to have records showing the average cost of keeping up its office and the approximate amount of work performed per year. This expense, however, generally ranges between 1 and 5 per cent of the work done. Perhaps 2 or 3 per cent would be a fair average.
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> • • • "

If a construction job is in progress longer than necessary because of an unreasonable delay, the overhead costs are greater.

In *Grand Trunk Western R. Co.* v. *H. W. Nelson* (C. C. A. 6), 116 F. (2d) 823, rehearing denied, 118 F. (2d) 252, it was held that office overhead was a proper item in measuring damages for delay during the construction of a railroad. Circuit Judge Hamilton, who delivered the opinion of the Court, stated in part as follows (pp. 838-839):

> "Determination of damages for breach of a contract is an inexact science and the sum reached by whatever method used will never be more than an approximation. This impossibility of precise determination is generally recognized and the law does not require mathematical certainty. Recognizing the evidential difficulties inherent in fixing damages to inflexible monetary terms, the law adjusts itself to the exigencies of the business world. • • •
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> "Appellee claimed $47,090.89 as overhead expenses in its schedule of losses which was submitted to the jury. Appellant insists that this item was not a proper element to be considered in measuring damages. Salaries of appellee's executive officers made up ap-

proximately one-half of the item, and there was included in it $8,500 for entertainment of prospective customers, $2,541.95 for maintaining a storage yard at Chillicothe, Ohio, $8,536.93 for traveling expenses and $5,605.05 under the heading 'sundries'.

"In computing damages for breach of a construction contract, overhead expenses may be considered These are not definable with precision but may be said to include broadly the continuous expenses of the business, irrespective of the outlay on a particular contract. McCloskey v. United States, 66 Ct. Cl. 105; State of Indiana v. Feigle, 204 Ind. 438, 178 N. E. 435. The jury was not required to view appellee's loss as totally separate and apart from its general work. When the present delay resulted, a part of the general expense of the appellee's business was incurred in the supervision of the employees and the maintenance of the machinery and equipment on the job here in question and also to the injunction suits which produced the the delay.

"The propriety and business necessity of the itemized charges in the account were sharply disputed and under the charge of the court, the jury were instructed to allocate to this job only a fair and reasonable amount of appellee's overhead, considering the supervision required and the proportionate amount of time and attention given.

"Overhead was one of the consequential expenses which the parties must have had in mind when the contract was entered into. This issue was submitted to the jury under a proper instruction. * * *"

In *Gulf States Creosoting Co.* v. *Loving* (C. C. A. 4), 120 F.(2d) 195, 203, decided May 22, 1941, Circuit Judge Soper, who delivered the opinion of the Court, stated in part as follows:

"There is no doubt that additional overhead expense is a proper element of damages. General Contracting Corp. v. United States, 4 Cir., 70 F. 2d 83; Portland Pulley Co. v. Breeze, 101 Or. 239, 199 P. 957; Clarke Const. Co. v. United States, 7 Cir., 290 F. 192; Patterson, Builder's Measure of Recovery for Breach of Contract, 31 Col. L. Rev. 1286; McCormick on Damages,

Sec. 165. The defendant, however, contends that the methods of computing the additional overhead expense used in these cases do not clearly reflect the losses caused by its breach. This objection must fail. In the Loving case, the loss was ascertained in the following manner: The entire overhead for the year ending October 31, 1938, was found, including salaries of officers and clerical employees, rent, telephone and telegraph expenses, dues and subscriptions, insurance, legal and auditing costs, office supplies and other miscellaneous items. Amounts expended in promotional work and cultivation of good will were not allowed. The percentage of the overhead to the total value of contracts completed in the year was then found. This figure, which turned out to be 2.524935%, was then applied to the value of the Albemarle Bridge contract, divided by 365 to get the daily cost, and then multiplied by 172 to find the overhead expense attributable to the bridge contract during the 172 days added to the construction period by the defendant's breach. A similar method was adopted in the Tidewater case, except that the total monthly expenditures upon contracts were used instead of yearly values. The method adopted by the Master in the Loving case was substantially that which had been approved by federal taxing authorities in allowing deductions for income tax purposes on the returns of the Loving Company. The additional overhead expenses, thus computed, were properly allowed."

In *Sofarelli Bros., Inc.*, v. *Elgin et al.*, (C. C. A. 4), 129 F. (2d) 785, decided July 22, 1942, involving a controversy between a general contractor and a subcontractor for the plumbing and heating work, it was also recognized in a suit to recover damages the allowance of overhead as an item of recovery was proper. Circuit Judge Dobie, who delivered the opinion of the Court, stated in part as follows (p. 788):

"We think the allowance of overhead as an item of recovery here is entirely proper. And we are not willing to say that an allowance of 10% is either arbitrary or unreasonable. See United States v. Behan, 110 U. S. 338, 4 S. Ct. 81, 28 L. ed. 168; Dravo Contracting Co. v. James Rees & Sons Co., 291 Pa. 387, 140 A. 148; Grand Trunk Western Ry. Co. v. H. W. Nelson Co., 6

Cir., 116 F. 2d 823; Elias v. Wright, 2 Cir., 276 F. 908; H. E. Crook Co., Inc. v. United States, 59 Ct. Cl. 348."

In *Montrose Contracting Co.* v. *Westchester County*, (C. C. A. 2), 94 F. (2d) 580, certiorari denied, 298 U. S. 670, involving the construction of a sewer, it was stated in part as follows (p. 584):

> "Appellee proved sufficiently its items of increased cost for labor, insurance, wages, materials, power, plant, and *overhead* to warrant the verdict of the jury. * * *" (italics supplied)

As the Court below determined the amount of increased costs resulting from the unreasonable delay in accordance with the test laid down by this Court, such finding is to be treated like the verdict of a jury and should not be disturbed.

The Court below has considered the evidence and made a finding that as a result of the unreasonable delay, the respondent incurred and paid increased costs of $51,249.52, which included overhead expenses at Montgomery office for 3½ months $18,093.52. The finding is clear and precise, free from ambiguity and conforms with the standards prescribed by this Court in *United States* v. *Smith*, 94 U. S. 214 and *United States* v. *Wyckoff Pipe & C. Co.*, 271 U. S. 263. The absence of the word "solely," in the particular finding under challenge here does not affect its sufficiency.

VII. The Government is Responsible for the Defaults of Its Mechanical Contractor Who Fails to Perform Such Work in Harmony With the General Construction, as a Result of Which the Entire Work is Seriously Delayed, and the General Contractor Suffers Increased Costs and Expenses.

The invitation for bids stated that, "Bids will be considered only from responsible individuals, firms, or corporations. In determining the lowest responsible bidder, consideration will be given as to whether the bidder involved maintains a permanent place of business; has adequate

plant equipment to do the work properly and expeditiously; has a suitable financial status to meet obligations incident to the work and has appropriate technical experience."

The respondent had the right to assume that the Government would award the mechanical contract to a responsible bidder. No general contractor is interested in bidding the general construction without the mechanical work unless he can rely on the assurance that the mechanical work will be awarded by the Government to a responsible bidder. The invitation for bids also stated that, "The plumbing work shall be performed at such times as may be directed by the Superintendent of Construction, so as not to delay any other work on the buildings." The contracts between the respondent and the Government and Redmon and the Government contained a provision that "The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor." (Finding 6, Tr. 35.) It is also the usual and recognized practice that the mechanical contractor must orderly and diligently so prosecute his work as to properly place and install all necessary mechanical equipment and materials as called for in the work of the general contractor so as not unreasonably to delay the progress of the work of the general contractor. (Finding 8, Tr. 36-37.)

Wasn't it the obligation of the Government to have the plumbing work performed in harmony with the general construction so as not to delay it? Wasn't this the intention of the parties? The fact that the Government elected to do the plumbing work through a third party does not relieve it of responsibility. The Government is responsible for its mechanical contractor who is to fit his work in with the general construction as it progresses in the same manner as a general contractor is responsible for his mechanical contractor, who is a subcontractor as far as the general con-

tractor is concerned when this branch of the work is included in the prime contract. If a general contractor sublets the mechanical work to a bidder who is not responsible, and because thereof the work is not completed in time, the general contractor must pay liquidated damages, and it is no answer to say that the delay was due to the fault of his mechanical contractor. See *Reichenbach* v. *Sage et al.*, 13 Wash. 364, 43 P. 354. A general contractor is responsible for his subcontractors, and likewise, when the Government separately awards the mechanical work to another contractor of its choosing, the Government is responsible.

If the Government pursues a course of awarding mechanical contracts to bidders who are not responsible, then general construction without the mechanical work becomes unattractive.

Wasn't it the obligation of the Government to terminate the mechanical contractor's right to proceed in time to prevent the unreasonable delay in this case? The Government had the right under Article 9. The mechanical contractor here was the Government's contractor. The respondent had no contractual relationship with him, or any control over him. This was a matter within the control of the Government, and the Government was certainly not without fault or negligence when it failed to award the mechanical contract to a bidder who was responsible, when it failed to have the work done in harmony with the general construction, and when it failed to terminate the mechanical contractor's right to proceed in time to prevent the unreasonable delay. These were obligations of the Government and it failed to fulfill them.

There was no provision in the respondent's contract to the effect that if the Government's mechanical contractor delayed the general construction, the Government would assume no responsibility or liability for damages for the delay, and if the Government intended that to be the contemplation of the contract, it is fair to assume that the Government would have included such language in the contract. That, however, would be harmful to the public interest, be-

cause the provision would result in higher bid prices for the general construction and restricted bidding.

In *Hinds* v. *Hinchman-Renton Fireproofing Co.*, (C. C. A. 8), 165 Fed. 339, 340-341, involving a contract where the owner was to do the excavating work, District Judge Phillips, who delivered the opinion of the Court, stated in part as follows:

> "The obligatory promise to have the company's outfit on the ground ready for work in two weeks after notice, and to complete the work within a given time thereafter, carried with it the implied agreement of the other party to be ready for the working outfit when it came after such notification. This mutuality of obligation carried with it accountability on the part of the plaintiff in error for the loss of time necessarily occasioned by the detention of the workmen from entering upon the construction work, after having been brought on the ground on notice from him that the preparatory excavation work was ready for the superstructure. This rule of law is aptly stated by Wagner, J., in Lewis v. Atlas Mutual Life Insurance Company, 61 Mo., loc. cit. 538, as follows:
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> > 'It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such correspondent and correlative obligation will be implied, as, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract, will be necessarily implied. Pordage v. Cole, 1 Wm. Saund. 319; Churchward v. The Queen, 6 B. & S. 807; Black v. Woodrow, 39 Md. 194.'
>
> "The answer itself, in effect, concedes that the obligation alleged in the petition was imposed upon the

plaintiff in error by the contract, as, after admitting the contract, it pleads facts in extenuation and mitigation. Furthermore, no such question was raised below by the plaintiff in error, nor was the trial court asked to rule thereon."

The Government's obligation to furnish the plumbing, heating and electrical work for the buildings was clear and definite. This work was expressly excluded from the respondent's contract, and the responsibility rested on the Government. The obligation was to furnish the mechanical work in harmony with the other work, so as not to delay any other work on the buildings. The Government endeavored to fulfill this responsibility through a third party by a separate contract, but the fact that the Government awarded the mechanical work to another does not relieve it of responsibility. The Government failed to have the work done in a timely manner, notwithstanding the fact that the mechanical contractor performed under the direction of and control of the Government. The respondent had no contractual relationship with the Government's mechanical contractor, or direction or control over him. The respondent bid the job on the Government's representation that the mechanical work would be awarded to a responsible bidder who would be required to perform in harmony with the other work. These are important obligations in consideration of which general contractors bid the general construction without the mechanical work, and in the present case the Government failed to fulfill the same.

There have been many cases decided by the Court of Claims where the Government was to furnish certain things to enable performance. *Karno-Smith Co.* v. *United States,* 84 C. Cls. 110 (failure to furnish models in a timely manner); *Newport News Shipbuilding & Dry Dock Co.* v. *United States,* 79 C. Cls. 1 (delay in furnishing materials for construction of battleship); *Weehawken Dry Dock Co.* v. *United States,* 65 C. Cls. 662 (failure to furnish materials and failure to approve plans promptly); *Fore River Shipbuilding Co.* v. *United States,* 62 C. Cls. 307 (failure to supply materials for construction of battleship in proper time);

Moran Bros. Co. v. *United States*, 61 C. Cls. 73 (failure to supply materials for construction of battleship); *Pneumatic Gun-Carriage & Power Co.* v. *United States*, 36 C. Cls. 71 (failure to have vessel ready for installations at proper place and failure to have hull of vessel constructed in proper time); *Bitting* v. *United States*, 25 C. Cls. 502 (failure to furnish material for work on building at agreed time). The present case is no different than any other where the Government has an obligation to furnish something to enable the efficient and economical performance of a contract. The fact that the Government may attempt to procure the same through another party by separate contract does not relieve it of responsibility. A general contractor procures work through subcontractors but this does not relieve the general contractor of responsibility. Please see also *Wood* v. *Ft. Wayne*, 119 U. S. 312; *Mansfield* v. *N. Y. C. & H. R. R. Co.*, 102 N. Y. 205; *Genovese* v. *Third Ave. R. Co.*, 43 N. Y. S. 8; *Nelson* v. *The Pickwick Associated Company*, 30 App. Ill. 333; *Mississippi* v. *Farish*, 23 Miss. 483.

CONCLUSION.

In conclusion, it is respectfully submitted that the respondent is entitled to recover his increased costs of $51,249.52 resulting from the unreasonable delay for which the Government was responsible. It is also respectfully submitted that the other issues in this case were properly decided by the Court below, but in the interest of brevity, they are not discussed here.

Respectfully submitted,

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